

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

<p>FILED</p> <p>December 13, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>THOMAS E. CROSCUP, JR., Appellant, V. STATE OF TENNESSEE, Appellee.</p>	<p>) C.C.A. No. 02C01-9502-CC-00042)) Lauderdale County)) Hon. Joseph H. Walker, Judge)) (Post-Conviction: First Degree Murder)))</p>
--	---

FOR THE APPELLANT:

Thomas E. Croscup, Jr., Pro Se
Brushy Mountain State Prison
Petros, TN 37845

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Michelle L. Lehmann
Counsel for the State
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Elizabeth T. Rice
District Attorney General

William K. Randolph
Asst. Dist. Attorney General
302 Market Street
Somerville, TN 38068

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

Petitioner Thomas E. Croscup, Jr., appeals from the trial court's dismissal of his pro se petition for post-conviction relief. He argues that the trial court improperly denied him the right to an evidentiary hearing.

We affirm the judgment of the trial court.

On June 6, 1979, the petitioner was convicted of first degree murder and sentenced to life in prison. This Court affirmed the conviction; and the Supreme Court denied permission to appeal on July 28, 1980. The petitioner filed a post-conviction petition on January 5, 1981, which was apparently denied.¹ The petitioner filed the present petition for post-conviction relief on August 16, 1994. He alleged ineffective assistance of counsel and erroneous jury instructions. The state filed a motion to dismiss contending that the petitioner's claims were barred by the statute of limitations. The trial court dismissed the petition without an evidentiary hearing.

Tennessee Code Annotated § 40-30-109(a)(1) (1990) provides that when a petition has been competently drafted and the record conclusively shows that the petitioner is not entitled to relief, the petition may be dismissed. Allegations in pro se petitions are held to less stringent standards than formal pleadings drafted by lawyers. Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975). The test is whether it appears, beyond doubt, that the petitioner cannot prove a set of facts supporting his claim which would entitle him to relief. Id. We find that the petitioner's petition was competently drafted.

We must next determine whether the statute of limitations bars the petitioner's claims. In July of 1986, the Post-Conviction Procedure Act was

¹The record is silent as to the details of the first petition.

amended. This amendment requires that petitions for post-conviction relief be filed within three (3) years of the highest state appellate court's final action. Tenn. Code Ann. § 40-30-102 (1990). A petitioner whose judgment became final prior to the effective date of the amendment, had three years from the effective date of the amendment, July 1, 1989, within which to file a petition for post-conviction relief before the statute of limitations barred consideration of the petition. State v. Masucci, 754 S.W.2d 90, 91 (Tenn. Crim. App. 1988). The petitioner filed the present petition approximately five years after July 1, 1989. Absent an exception, the statute bars his petition from consideration.

Case law has carved out two exceptions to the statute of limitations:

1) Application of the statute would deprive a litigant of a reasonable opportunity to have the issue heard and decided in violation of the due process clause. Burford v. State, 845 S.W.2d 204 (Tenn. 1992); Sands v. State, 903 S.W.2d 297 (Tenn. 1995); and

2) Where a new constitutional right has been created after the expiration of the statute of limitations which requires retroactive application.

Tenn. Code Ann. § 40-30-105 (1990).

We now turn to the petitioner's allegations in his petition and brief on appeal. The first six allegations relate to ineffective assistance of counsel either at trial or during a previous post-conviction proceeding. These allegations are barred by the statute of limitations and do not fall within either exception. Furthermore, the petitioner has no constitutional right to counsel in a state post-conviction proceeding; therefore, no claim may be predicated on denial of effective assistance of counsel. Caruthers v. State, 814 S.W.2d 64, 65 (Tenn. Crim. App. 1991). See also House v. State No. 03-S-01-9407-CR-00069, slip op. at 2-3 (Tenn. Sept. 25, 1995).

The next eleven allegations, labeled a-k, are under the heading of "[u]nconstitutional burden shifting jury instructions." Allegations a, i, j and k are barred by the statute of limitations and do not fit within any exception.

Several allegations relate to State v. Brown, 836 S.W.2d 530 (Tenn. 1992). These allegations are that the trial court erroneously instructed the jury that: c) deliberate is defined as with a cool purpose; d) & h) intent or design may be conceived and deliberately formed in an instant; and g) the elements of premeditation and deliberation can be inferred from the circumstances of the killing. In Brown, the Supreme Court stated that "it is prudent to abandon an instruction that tells the jury that 'premeditation may be formed in an instant.' Such an instruction can only result in confusion, given the fact that the jury must also be charged on the law of deliberation." Id. at 543. The Supreme Court did not hold that the instruction on premeditation violated a constitutional right. The Court did not intend that Brown should be applied retroactively to invalidate every first degree murder case wherein the jury had been instructed that premeditation may be formed in an instant. State v. Bacon, No. 1164 (Tenn. Crim. App. Aug. 4, 1992); Lane v. State, C.C.A. No. 03C01-9403-CR-00089 (Tenn. Crim. App. Jan. 27, 1995). Therefore, the petitioner's allegations are not of a constitutional dimension and will not support a claim for post-conviction relief. Furthermore, Brown does not apply retroactively. The statute of limitations bars consideration of these claims.

The petitioner's remaining allegations in his brief are as follows: b) & e) error to instruct that all homicides are presumed to be malicious absent rebuttal evidence; and f) error to instruct that if a deadly weapon is used, then there is a presumption of proof of second degree murder unless rebutted by other facts and circumstances. Relying on Sandstrom v. Montana, 442 U.S. 510 (1979), the petitioner argues that the jury instructions render his conviction unconstitutional. Sandstrom established that the due process clause of the fourteenth

amendment prohibits jury instructions that have the effect of relieving the state of its burden of proof on the element of intent in a criminal prosecution. This decision announced a constitutional rule decided after the petitioner's conviction. On January 12, 1988, the United States Supreme Court held that Sandstrom is to be given retroactive application. Yates v. Aiken, 484 U.S. 211 (1988).

In State v. Bolin, 678 S.W.2d 40 (Tenn. 1984), however, the Court held that a jury instruction virtually identical to the instruction in allegation f was constitutional. Unlike the instruction in Sandstrom, the instruction in Bolin contained the language "raises a presumption of malice, unless rebutted by other facts and circumstances to the contrary." Id. at 41. The Court stated that "[t]he words of the presumption, the immediate context in which they appear, and the overall context of the jury instruction, remove this case from the due process trap adjudicated in Sandstrom, in our opinion." Id. at 42. The Court emphasized the importance of judging a single jury instruction in the context of the overall charge, and not in isolation. The overall charge to the jury was important, if not vital, to the Court's decision.

The instructions on review appear similar to those in Bolin and are likely constitutional, precluding a basis for post-conviction relief. We, however, need not inquire further because appellant has a statute of limitations problem as to this burden shifting issue. The retroactive application of Sandstrom occurred in 1988. By any measurement of the limitations period, the petitioner filed this 1994 petition too late. See Abston v. State, 749 S.W.2d 487 (Tenn. Crim. App. 1988); State v. Masucci, 754 S.W.2d 90 (Tenn. Crim. App. 1988); State v. Mullins, 767 S.W.2d 668 (Tenn. Crim. App. 1988).

We assume that our reasoning is similar to that of the trial court when it dismissed the petition. We point out that Tenn. Code Ann. § 40-30-118 (1990) mandates that the final order should state in writing the findings and conclusions

of law regarding each ground. This was not done in the present case. Such omission does not necessarily constitute reversible error, but courts should delineate reasons pursuant to the post-conviction act. Swanson, 749 S.W.2d at 736 n.3.

Consistent with this opinion, the order of dismissal by the trial court is

AFFIRMED.

PAUL G. SUMMERS, JUDGE

CONCUR:

JOE B. JONES, JUDGE

WILLIAM M. BARKER, JUDGE